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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 65.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 24, 1904.

(18,983.)

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(18,983.)

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TWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1904.

1 In the Court of Appeals of the District of Columbia.

MARTHA I. HUNT, Appellant,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation. } No. 1169.

Supreme Court of the District of Columbia.

MARTHA I. HUNT
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY. } No. 44753. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed June 18, 1901.

In the Supreme Court of the District of Columbia.

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INS. Company (a Corporation), Defendant. } At Law. No. 44753.

The plaintiff, Martha I. Hunt, sues the defendant, The Springfield Fire and Marine Insurance Company, a corporation incorporated under the laws of the State of Massachusetts and engaged in doing business within the District of Columbia, for that:

First. Whereas heretofore, to wit, on or about the 2nd day of February, 1901, at the city of Washington, in the District of Columbia, by a certain policy of insurance then and there made, for and in consideration of the stipulations therein recited and the payment by the plaintiff to the defendant of the sum of fifteen dollars as a premium, the defendant did insure the plaintiff for the term of one year from on or about the 2nd day of February, 1901, against all direct loss or damage by fire, provided that such loss was not
2 caused, directly or indirectly, by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by

order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire, or by explosion of any kind, to an amount not exceeding the sum of five thousand dollars ($5,000.00), on the following-described property named in said policy of insurance, to wit, household furniture, useful and ornamental beds, bedding, linen, carpets, printed books, mirrors, musical instruments, music, sewing machines, family wearing apparel, fuel, family stores, trunks, valises, umbrellas, bicycles, plate and plated ware, pictures and their frames, statuary, and ornaments contained in the two-story metal-roofed brick dwelling situate at No. 1636 Sixteenth street N. W., in the city of Washington, District of Columbia, and by the terms of the policy the defendant agreed to pay the plaintiff the amount of any such loss, not exceeding the amount of the said insurance, at the expiration of sixty days after the defendant had been furnished by the plaintiff with proofs of such loss; and the plaintiff says that at the time of the making of the said policy of insurance, and from thence until the loss and damage hereinafter mentioned, — was possessed as sole owner of the said insured property in the said policy mentioned and thereby intended to be insured; and the plaintiff says that the premium in said policy mentioned was at the time of the making thereof duly paid by her to the defendant; and the plaintiff further says that after the making of the said policy and whilst the same was and remained in full force, to wit, on or about the February 16th and February 17th, 1901, the said insured property was burned, damaged, consumed, and destroyed by fire, whereby the plaintiff sustained loss and damage, to wit, five thousand dollars; and the plaintiff further says that although she has in all things conformed herself to and performed and observed all and singular the stipulations in said policy mentioned and on her part to be performed and observed according to the true intent and meaning thereof, and although the proofs of the said loss in due form and in accordance with the stipulations in the said policy of insurance contained were furnished by the plaintiff to the defendant on the 2nd day of April, 1901, and the plaintiff then offered to furnish the defendant with such further proof of the said loss as it might be entitled to request of her, yet the plaintiff says that, although upwards of sixty days have elapsed since the said 2nd of April, 1901, the defendant has refused to pay her the said loss or any part thereof, and the defendant and its agents have refused to replace or repair the said insured property which was burned, damaged, and destroyed, as aforesaid, with property of like kind and quality, or with any property whatsoever, such refusal on the part of the defendant being contrary to the true intent and meaning of the said policy of insurance and of the agreement of the defendant in that behalf made and set forth as aforesaid; and the plaintiff says the defendant,
3 although often requested so to do, has refused to perform its said agreement and has broken the same, and to perform the same does still refuse, and the plaintiff claims the sum of five

thousand and twelve $\frac{50}{100}$ dollars ($5,012.50), being the total amount of the policy, and $12.50 interest on same from June 2nd, 1901, to June 17th, 1901, together with interest thereon from June 17th, 1901, besides the costs.

Second. For money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant and for work done and materials provided by the plaintiff for the defendant at its request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at its request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them, and the plaintiff claims the sum of five thousand and twelve $\frac{50}{100}$ — ($5,012.*50*), with interests besides costs.

JOHN C. GITTINGS,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

JOHN C. GITTINGS,
Attorney for Plaintiff.

Defendant's Pleas.

Filed July 9, 1901.

In the Supreme Court of the District of Columbia.

MARTHA I. HUNT, Plaintiff, *vs.* THE SPRINGFIELD FIRE AND MARINE INS. Company (a Corporation), Defendants.	}	At Law. No. 44753.

* * * * * * *

4. For a further plea to the first count of the plaintiff's declaration the defendant says that in and by said policy of insurance it was provided that it should be void if the interest of the insured in the property insured at the time of the insurance was other than unconditional and sole ownership; and the defendant says that at the time of said insurance the plaintiff was not the unconditional and sole owner of the property insured, in this, that prior to said insurance the plaintiff had conveyed said property or a part thereof

(*a*) to A. H. Williams and C. H. Willard, by deed dated September 4, 1900, which was recorded September 25, 1900, in Liber 2526, folio 20, of the land records of the District of Columbia, said deed being a deed in trust to secure the payment to C. Webster of the

sum of one hundred and eleven dollars and seventy cents
4 ($111.70), with interest, the property covered by said deed of trust being more particularly described in said deed of trust and a schedule thereto attached;

and (*b*) to A. H. Williams and C. H. Willard, by deed dated October 4, 1900, and recorded November 7, 1900, in Liber 2487, folio 438, of the land records of the District of Columbia, said deed being a deed in trust to secure payment to C. Webster of the sum of one hundred and seventeen dollars and fifty-five cents ($117.55), with interest, the property covered by said deed of trust being more particularly described in said deed of trust and schedule thereto attached;

and (*c*) to C. H. Albaugh and J. W. Wilson, by deed dated November 26, 1900, which was recorded on the same day in Liber 2529, folio 157, of the land records of the District of Columbia, said deed being a deed in trust to secure the payment to D. R. McNaught of the sum of three hundred and seventeen dollars and fifty-two cents ($317.52), with interest, the property covered by said deed of trust being more particularly described in a paper annexed to said deed as recorded and marked Schedule "A."

5. And for a further plea to the first count of the plaintiff's declaration the defendant says that in and by said policy of insurance it was provided that if the subject-matter of the insurance should be personal property the said policy should be void if said property should be or become encumbered by a chattel mortgage, and, in fact, the subject of insurance in said policy was wholly personal property, and that the same was encumbered by certain chattel mortgages, as more specifically set forth in the above plea numbered four.

6. And for a further plea to the first count of the plaintiff's declaration the defendant says that in and by said policy of insurance it was provided that if the subject of the insurance should be personal property the said policy should be void if said property should be or become encumbered by chattel mortgage, and that in fact the subject of insurance in said policy was wholly personal property, and that after the execution of the said policy, to wit, on February 7, 1901, the said plaintiff executed a chattel mortgage, whereby she encumbered the personal property or part thereof covered by said policy of insurance, and conveyed the same by deed dated February 7, 1901, which was recorded on the same day in Liber 2533, folio 322, of the land records of the District of Columbia, said deed being in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars ($420.00), with interest, the property covered by said deed of trust being more particularly described in a paper annexed to said deed as recorded and marked Schedule "A."

* * * * * * *

A. B. DUVALL,
Attorney for Defendant.

5 *Demurrer to 5th and 6th Pleas.*

Filed July 26, 1901.

In the Supreme Court of the District of Columbia.

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE Company (a Corporation), Defendant. } At Law. # 44753.

Now comes the plaintiff and demurs to the defendant's fifth (5th) and sixth (6th) pleas, and states that the same are bad in substance.

JOHN C. GITTINGS,
JOHN R. SHIELDS,
Attorneys for Plaintiff.

One of the matters of law intended to be argued is that the matter alleged in the fifth plea is no defense, unless the defendant suffered some detriment thereby.

One of the matters of law intended to be argued is that the terms "chattel mortgage" and "chattel trust," as set forth in the sixth plea, are not interchangeable.

Supreme Court of the District of Columbia.

FRIDAY, *November* 15*th*, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE Company (a Corporation), Defendant. } No. 44753. At Law.

Come now the parties herein, by their respective attorneys, and the plaintiff's motion herein filed to strike out defendant's 2nd and 4th pleas coming on to be heard, it is, upon consideration thereof, ordered that said motion be, and it is hereby, granted, with leave, however, to defendant to plead over, as *he* may be advised, within ten days hereof; and, further, the plaintiff's demurrer to the defendant's 5th and 6th pleas coming on for hearing, it is, upon consideration thereof, ordered that said demurrer be, and it is hereby, overruled; to which the said plaintiff, by her attorney, in open court, notes an exception.

6 Supreme Court of the District of Columbia.

WEDNESDAY, *December* 18, 1901.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

MARTHA I. HUNT, Plaintiff,
vs.
THE SPRINGFIELD FIRE AND MARINE INS. Company (a Corporation), Defendant. } No. 44753. At Law.

It appearing to the court that an order was passed herein November 15th, 1901, overruling plaintiff's demurrer to defendant's fifth and sixth pleas, and the plaintiff now in open court electing to stand upon said demurrer, judgment is ordered; therefore it is considered that the said plaintiff herein take nothing by this suit; that said defendant go thereof without day and recover against said plaintiff its costs of defense, to be taxed by the clerk, and have execution thereof. From the aforegoing the plaintiff, by her counsel, in open court, notes an appeal to the Court of Appeals and prays that bond for costs on said appeal be fixed; whereupon the court orders that such a bond in the sum of one hundred ($100.00) dollars, with surety to be approved by the court, be filed herein, or that in lieu of such appeal bond she is hereby granted leave to deposit fifty ($50.00) dollars in the registry of this court.

Memorandum.

1901, December 19.—Bond on appeal filed.

Order for Record on Appeal.

Filed December 20, 1901.

In the Supreme Court of the District of Columbia, the 20th Day of December, 1901.

MARTHA I. HUNT
vs.
THE SPRINGFIELD FIRE AND MARINE INSURance Company (a Corporation). } At Law. No. 44753.

The clerk of said court will make record for the Court of Appeals, including only the following pleadings, to wit:

Declaration.

Defendant's 5th and 6th pleas.

Plaintiff's demurrer thereto.

Order overruling demurrer, and the judgment of the court thereon.

JOHN C. GITTINGS,
Attorney for Plaintiff.

O K.
A. B. DUVALL.

7 UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 9, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44,753, at law, wherein Martha I. Hunt is *plaintiff and The Springfield Fire and Marine Insurance Company* is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1169. Martha I. Hunt, appellant, *vs.* The Springfield Fire and Marine Insurance Company, a corporation. Court of Appeals, District of Columbia. Filed Jan. 17, 1902. Robert Willett, clerk.

8 FRIDAY, *April 4th, A. D.* 1902.

MARTHA I. HUNT, Appellant,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation. } No. 1169.

The argument in the above entitled cause was commenced by Mr. John C. Gittings attorney for the appellant, and was continued by Mr. A. B. Duvall attorney for the appellee, and was concluded by Mr. John C. Gittings attorney for the appellant.

9 MARTHA I. HUNT, Appellant,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation. } No. 1169.

(Mr. Justice SHEPARD delivered the opinion of the court.)

This action was begun by appellant as plaintiff to recover upon a policy of fire insurance covering certain household furniture and other personal property. The declaration is in the ordinary form containing all the necessary allegations.

Several pleas were filed by the defendant, to which the plaintiff demurred. Only one of these, with the action thereon, need be considered.

It alleged a condition of the policy to the effect that the same should be void if the property insured should be or become encumbered by a chattel mortgage; and further, that after the execution of the policy the plaintiff did encumber the same by a chattel mortgage in the form of a conveyance to a certain party in trust with power of sale and so forth, to secure certain indebtedness therein recited.

The court overruled the demurrer to this plea and, plaintiff having elected to stand upon her demurrer, entered judgment for the defendant, from which this appeal has been prosecuted.

It is conceded that the condition pleaded is a valid one and, if broken, presents a bar to the action. Dumas *v.* Insurance Co. 12 App. D. C. 245.

But the contention is, that the terms of the condition must be strictly construed, resolving all doubts in favor of the insured; and that so construed there is a distinction at law, to which effect must be given, between the chattel mortgage therein mentioned and a chattel deed in trust as described in the plea.

The argument in support of this contention is ingenious, but lacks substantial foundation. There is no ambiguity in the language of the condition set out in the policy. Its plain purpose is to guard against the encumbrance of the insured personal property, without the knowledge and consent of the insurer, whether it be by way of a technical chattel mortgage simply, by such a mortgage with power of sale in the mortgagee, or by a conveyance in trust to third persons with similar power of sale in case of the default of the mortgagor. Each is a chattel mortgage within the ordinary meaning of the term. Middleton *v.* Park 3 App. D. C. 149, 164.

That case was an action of ejectment to recover the possession of land that had been sold under a deed of trust executed by a guardian under the authority of the equity court. The authority given was to "mortgage" the land. The case turned upon the contention, which was denied, that the power to "mortgage" did not authorize a security by conveyance in trust. That contention had more plausible foundation than the one in the case at bar.

The court was right in overruling the demurrer and the judgment must be affirmed, with costs. It is so ordered.

Affirmed.

11 TUESDAY, *May 6th, A. D.* 1902.

MARTHA I. HUNT, Appellant,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation. } No. 1169. April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 6, 1902.

FRIDAY, *June 5th, A. D.* 1903.

MARTHA I. HUNT, Appellant,
vs.
THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, a Corporation. } No. 1169.

On motion of Mr. D. W. Baker on behalf of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of two hundred dollars.

12 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Martha I. Hunt, appellant, and The Springfield Fire and Marine Insurance Company, a corporation, appellee, a manifest error hath happened, to the great damage of the said appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings afore-

said being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of June, in the year of our Lord one thousand nine hundred and three.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

13 (*Bond on Writ of Error.*)

Know all men by these presents, that we, Martha I. Hunt, as principal, and A. L. Saltzstein, as surety, are held and firmly bound unto Springfield Fire and Marine Insurance Company, a corporation in the full and just sum of two hundred dollars to be paid to the said Springfield Fire and Marine Insurance Company its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court between Martha I. Hunt, appellant and Springfield Fire and Marine Insurance Company, appellee, a judgment was rendered against the said Martha I. Hunt and the said Martha I. Hunt having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Springfield Fire and Marine Insurance Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Martha I. Hunt shall prosecute said writ of error to effect, and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MARTHA I. HUNT, [SEAL.]
By D. W. BAKER, *Att'y in Fact.*
A. L. SALTZSTEIN. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

O. K.
A. B. D.

Approved by—
M. F. MORRIS,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1169. Martha I. Hunt, *vs.* The Springfield Fire and Marine Insurance Co. Bond on writ of error to Sup. Court U. S. Court of Appeals, District of Columbia Filed Jun- 22—1903. Robert Willett clerk.

14 UNITED STATES OF AMERICA, *ss:*

To the Springfield Fire and Marine Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Martha I. Hunt is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. F. Morris, associate justice of the Court of Appeals of the District of Columbia, this 22d day of June, in the year of our Lord one thousand nine hundred and three.

M. F. MORRIS,
Associate Justice of the Court of Appeals of the District of Columbia.

Service acknowledged
A. B. DUVALL, *Att'y.*

6/23/03.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 23 1903 Robert Willett, clerk.

15 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 14 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Martha I. Hunt, appellant *vs.* The Springfield Fire and Marine Insurance Company, a corporation, No. 1169, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 23d day of June, A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,983. District of Columbia Court of Appeals. Term No. 65. Martha I. Hunt, plaintiff in error, *vs.* The Springfield Fire and Marine Insurance Company. Filed June 24, 1903. File No. 18,983.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 65.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

BRIEF SUBMITTED IN BEHALF OF PLAINTIFF IN ERROR.

This is a writ of error to the Court of Appeals of the District of Columbia to review their judgment affirming the judgment in favor of the defendant in error, rendered in the supreme court of the District of Columbia December 18, 1901.

STATEMENT OF FACTS.

Plaintiff in error brought suit on a policy of insurance issued by the defendant in error, insuring against loss or damage by fire the certain household furniture and personal property contained in her residence, 1636 Sixteenth street northwest, in the city of Washington, District of Columbia.

The declaration, among other things, alleges that the policy was issued by the defendant to the plaintiff February

2, 1901; that thereafter, along about the 16th and the 17th days of February, 1901, a fire occurred at said dwelling, plaintiff in error being damaged thereby to the extent of $5,000; that all the terms of the policy were complied with in every respect; that the defendant, although repeatedly requested, has failed and refused to pay the damages sustained. The plaintiff claimed in her declaration the sum of $5,000 and $12.50 accured interest.

To this declaration the defendant filed seven pleas, the plaintiff joining issue upon the first, third, and seventh, moving the court to strike out the second and fourth, and demurred to the fifth and sixth pleas (Rec., p. 5). Plaintiff's motion to strike out the second and fourth pleas was sustained, but the demurrer to the fifth and sixth pleas was overruled, to the overruling of which the plaintiff noted an exception (Rec., p. 5). The defendant's fifth plea was that—

> "By said policy of insurance it was provided that if the subject-matter of the insurance should be personal property the said policy should be void if the said property should be or become incumbered by a chattel mortgage, and in fact the subject of insurance in the said policy was wholly personal property and that the same was incumbered by certain chattel mortgages, as more specifically set forth in plea numbered 4."

Plea numbered 4 (Rec., pp. 3, 4) described *three certain deeds in trust* given several months prior to procuring the policy of insurance. Defendant's sixth plea set up as a defense the same condition, and then proceeded to describe as a breach thereof a *certain deed in trust* given by plaintiff subsequent to the procuring of the insurance (Rec., p. 4). The plaintiff in error elected to stand on her demurrer; whereupon judgment was entered for the defendant, from which an appeal was taken to the Court of Appeals and there affirmed (Rec., pp. 7, 8, 9).

ASSIGNMENTS OF ERROR.

1st. The trial court erred in overruling plaintiff in error's demurrer to defendant's fifth plea, the said plea on its face showing that the condition of said policy related solely to encumbrances by chattel mortgages, and the instruments claimed as a breach thereof, set forth in said plea, being instruments of another character and known as deeds of trust (Rec., p. 5).

2d. The trial court erred in overruling plaintiff in error's demurrer to defendant's sixth plea, the said plea on its face showing that the condition of said policy related solely to encumbrances by chattel mortgages, and the instrument claimed as a breach thereof, set forth in said plea, being an instrument of another character and known as a deed of trust (Rec., p. 5).

3d. The trial court erred in holding the instruments recited in the defendant's fifth and sixth pleas (Rec., pp. 3, 4) to be chattel mortgages within the meaning of the condition in the policy of insurance.

ARGUMENT.

The three assignments of error all relate to the one point involved in this case; therefore they will be discussed together.

There of course can be no question but that the condition set forth in the defendant's fifth and sixth pleas, if valid, operates as a forfeiture. Conceding, for the purpose of argument, that this condition is valid, how shall it be construed? We respectfully submit the rule of construction applicable to similar conditions in policies of insurance where said con-

dition may operate as a forfeiture, as laid down by this court in Thompson *vs.* Insurance Company, 136 U. S., p. 196, and by almost, if not all, of the courts of this country, is: "If the policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted which is most favorable to the insured. This rule, recognized in all the authorities, is a just one because those instruments are drawn by the company" (136 U. S., p. 297).

In nearly every one of the insurance cases relating to forfeitures the court will be found emphasizing this rule.

See also Knickerbocker Life Insurance Company *vs.* Norton, 196 U. S., p. 246.

Kansas City First National Bank *vs.* Fire Insurance Company, 95 U. S., p. 673.

Upon this point the supreme court of Indiana uses the following lauguage:

> "Provisions intended to create a forfeiture wherever found, are strictly construed in order to avert the forfeiture; but such provisions are restricted, with especial care and strictness, in contracts of insurance, the courts, with an almost unanimous voice, deciding that such contracts, because of their peculiar character, shall be strictly and rigidly construed against the insurance company wherever a strict construction is necessary to prevent the forfeiture of the policy."
>
> Continental Insurance Company *vs.* Vanlue, 126 Indiana, p. 410.

This court has recently emphasized this doctrine in the case of McMaster *vs.* New York Life Insurance Company, 183 U. S., p. 26, the court saying on page 40 of its opinion:

> "We are dealing purely with the question of forfeiture, and the rule is if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, that would sustain rather than forfeit the contract."

The rule of construction having been determined, let us see what is the effect of the condition here relied on, applying this rule. The condition here is "be or become encumbered by a chattel mortgage." We do not contend that this clause is ambiguous and requires interpretation for that reason. What we do contend is that it is limited in its scope. It does not apply to all encumbrances and is not as broad as if the condition was "be or become encumbered," as used in some policies. It is restricted to the character of instrument it specifically mentions.

We therefore contend that it was the duty of the court below, sitting as a court of common law, to construe the condition set up in the fifth and sixth pleas strictly and in accordance with what is meant by the term *chattel mortgage in a court of law*, regardless of what courts of equity have held to be deeds in the nature of chattel mortgages; and if there was even a technical difference between a chattel mortgage and the instruments set forth in the defendant's fifth and sixth pleas, the plaintiff in error's demurrer should have been sustained. That there is a clear and distinct difference in law between a chattel mortgage and a deed of trust, although both instruments have the same effect in a court of equity, seems to be well settled.

Although under the authority if the difference was only a technical one, the courts would favor the insured in preference to having a forfeiture defeat the right to recover, while here we find a substantial difference, which must readily be seen, when we construe the rights of the several parties to the instruments in a court of law. In a chattel mortgage we have a conditional sale by the grantor to the grantee, placing the legal title in the grantee—*i. e.*, the mortgagee—who after default has, in a court of law, all the legal rights of an absolute owner, and can maintain replevin, trover, trespass, or any of the other common-law actions in protection of the property in mortgage, while the grantor or mortgagor cannot sell or transfer the chattels either before or after default without

the consent of the mortgagee. Can it be said that the *cestui que trust*, or party secured by a deed of trust conveying chattels to a trustee, whom the courts sometimes improperly term the mortgagee, maintain any action in a court of law? Is his interest recognized by a court of law in any manner? If so, by what action? However, the defendant may contend that a trustee in a deed of trust is the mortgagee, and after default he can maintain any of the actions that a mortgagee could. A sufficient answer to that contention, we assume, would be that a mortgagee after default has not only the legal title, but, in addition, all the equitable interests that the *cestui que trust* has; and if these are not material and substantial differences, there are none known to the law.

Once say that this clause refers to deeds in the nature of a mortgage and encumbrances generally, because it was the clear intention of the insurance company to prevent one insuring property unless he is the sole owner of the entire interest therein free from liens of all kinds and description, then the courts would necessarily be compelled to hold that the personal tax liens, judgments with execution levied, and even pledges come within its terms. Can this be the law when this condition mentions specifically a certain kind of instrument well known and its character well understood? The reason of the condition being placed in the policy was that the company desired to know what encumbrances there were on the property before insuring, and it cannot be taken into consideration in interpretating its scope. These pleas setting up this condition do not allege that plaintiff stated in his application for insurance there were no chattel mortgages on the property which would, of course, in effect be a warranty and probably place defendant in a more favorable light. *Here we have pleas which set up a forfeiture clause without any allegation of misrepresentation whatever in relation to the condition relied upon*, and right in this connection we desire to call the court's attention that if there

were any misrepresentations we can assume that the application will show. We must assume, of course, that there was an application made, as the law in this jurisdiction required, at the time this policy here sued on issued. Section 6 of the act of January 26, 1887, p. 582, vol. 1, Supplement of Revised Statutes U. S., is:

> "That each insurance company doing business in the District of Columbia shall attach to each policy issued by such company a copy of the application made by the insured, so that the whole contract may appear in said application and policy."

In Maryland there is an act of the legislature that required an affidavit to be endorsed upon every deed of mortgage and bill of sale, to make them valid, by the mortgagee or grantee, that the consideration therein set out is true and *bona fide*. The question whether this act applied to deeds of trust arose in the case of Charles *vs.* Clagett, 3d Maryland, p. 82. The facts of that case were that one Grimes owning certain property in Washington county, Maryland, and being a non-resident, Charles, a creditor, sued out an attachment which was levied upon certain property. At the return day Clagett appeared claiming title to the property under a deed of trust from Grimes and wife, which had been duly recorded, given to secure a note owned by a third party in the sum of six thousand ($6,000) dollars. The plaintiff, Charles, was ordered to reply to the claim of Clagett, and did so by alleging that the deed under which Clagett claimed was a deed of mortgage, and no affidavit having been made, either by the trustee or his *cestui que trust*, that the condition therein set forth was true and *bona fide*, as required by the act, the said deed was void. The parties then filed an agreed statement of facts in which the non-residence of Grimes, the debt on which the attachment was issued, the dates of the deed and its recording, and that the property levied on was embraced in it, were admitted, and the case was sub-

mitted to the court for its opinion as to whether it was an instrument which came within the terms of the act. The trial court decided it did not.

The plaintiff, Charles, appealed, and, after an exhaustive discussion of the case by counsel and the court, the court decided the deed of trust does not come within the purview of the act, and in the course of its opinion said:

> "It has been insisted by the appellant's counsel, that inasmuch as the deed in controversy was intended to secure the payment of a debt, and contains what he terms a redemption clause, it is a mortgage, within the meaning of the statute. If this be true, it is difficult to perceive, why it is not also a deed conveying all the grantor's property to a trustee, with power to sell after a time limited, and apply the proceeds to the payment of the debt, if he, the grantor, should fail to pay them by the appointed time, providing for a reconveyance, in case of payment by him within the time. * * *
>
> "Once admit that the word *mortgage* in this statute includes any other instrument than a purely technical mortgage, under which there is not only an equity of redemption in the mortgagor, but on failure of payment, the mortgagee may recover possession of the premises, take and retain the rents and profits, and has the right of foreclosure, and it will be exceedingly difficult to say what deeds are or what are not within the act. It will be no easy task to define the dividing line between mortgages and deeds of trust.
>
> "There are instruments which are mortgages only by equitable construction * * * A vendor's lien is called an equitable mortgage.
>
> * * * * * * *
>
> "In my opinion the act of 1846 should be construed as including mortgages, technically such.
>
> * * * * * * *
>
> "Much fault is found with the indiscriminate and improper extent to which, in some instances, these subjects" (mortgages and deeds of trust) "have been

blended, and particularly in applying the term trustee to a mortgagee. The names of mortgagor and mortgagee are considered the most proper to characterize the relation. These are 'characters as well known, and their rights, powers and interests as well settled, as any in the law.' This is introduced as the remark of Mr. Justice Buller in Birch *vs.* Wright. *Of course he had reference to a mortgage, technically such, and not one which is so considered merely by equitable construction.*

"When we resort to the elementary writers for the definition of a mortgage, it will be seen that on failure in payment, the legal title and the right of possession are in the mortgagee, with the privilege of foreclosing at his pleasure.

* * * * * * *

"In the present deed the legal estate is conveyed to the trustee; the *cestui que trusts*, who have been called the mortgagees, in no event are entitled to possession, nor have they any right of foreclosure."

See also—

Bank of Commerce *vs.* Lannahan, 45th Maryland, pp. 396–407.

Stanhope *vs.* Dodge, 52 Md., p. 490.

Harrison *et al. vs.* Annapolis & Elkridge R. R. Co., 50th Md., p. 490.

The *nisi prius* courts in Maryland, in construing the recent act of the legislature of that State imposing a tax on all mortgages, have all held that it does not apply to deeds of trust and they are not affected by it.

The court of appeals in disposing of the case at bar says "that the argument in support of this contention is ingenious, but lacks substantial foundation. There is no ambiguity in the language of the condition set out in the policy, and its plain purpose is to guard against encumbrances of the insured personal property without the knowledge of the insured, whether it be by way of a technical chattel mortgage simply by such a mortgage with power of sale in the mortgagee, or by a conveyance in trust to third

persons with similar power of sale in case of default of the mortgagor, each as a chattel mortgage within the ordinary meaning of the term" (Rec., p. 8).

With all due respect to that court, this is certainly begging the question.

The court then recited the case of Middleton *vs.* Park, 3 Appeals D. C., 149–164, in support of its decision. Upon examination of this case we find that it has absolutely no application to the case at bar. The following were the facts: A guardian, upon a proper showing to the orphans' court, was authorized to borrow $300 by a mortgage upon certain of the infant's real estate for the purpose of paying taxes in arrears and a few debts. Upon her petition in the supreme court of the District of Columbia, holding an equity court, the orphans' court order was ratified by said court. The guardian then proceeded to borrow $300, payable in three years, and executed a deed of trust of the property in question to two trustees, the deed of trust being similar to the ordinary form used in the District of Columbia. A default being made, the trustees, under the terms of the deed of trust, offered the property for sale, and the defendant Park became the purchaser. Fourteen years thereafter the infant brought an action of ejectment to recover the property. The court, in its opinion, says, on page 163:

> "But it is contended * * * that even if it be that the court had power to direct the execution of a mortgage, yet the authority given to the guardian was not properly exercised in this instance by an execution of a deed of trust, such as is here given.
>
> "It is argued that a deed of trust differs from a mortgage; * * * and that it was improper in any event to convey the property to two strangers as it was done here to make sale of it in a certain contingency. These and other minor objections that have been suggested rather tend to impeach the irregularities of the transaction, which can scarcely be done in a collateral proceeding. * * * There remains, however, the question whether the execution

of a deed of trust is a compliance with the authority 'to mortgage the real estate of said minor.' It is sufficient answer to this that the deed of trust is the only form of mortgage which has been in general use in the District of Columbia for many years. The common-law mortgage is practically unknown with us; and every one understands that, when a mortgage of real estate here is spoken of a deed of trust is what is intended. *The petition of Katherine Middleton alleges that it was better to mortgage the property than to sell it and asked for leave to borrow the money upon a deed of trust or mortgage, and the order of the court was for leave to mortgage it.*

"The deed of trust is here used as an equivalent of a mortgage, and so the term is universally used by the community. Indeed, while a mortgage is not necessarily, perhaps, a deed of trust, a deed of trust to secure a loan of money is necessarily a mortgage" (Rec., pp. 163, 164.)

As we have shown, that case related solely to the proper construction of an authority granted by a court of equity, and of course was treating the question from the point of view of the court who granted the authority. We, of course, concede, as Mr. Justice Morris states in that decision, that "in equity a deed of trust has the same force and effect as a mortgage." But could the Court of Appeals of the District of Columbia have intended to say that there is no distinction in a court of common law between a mortgage and a deed of trust? Certainly they could not have been ignorant of the Maryland authorities, when in fact their chief justice delivered the opinion in the case of The Bank of Commerce *vs.* Lannahan, 45 Md., p. 396.

The Court of Appeals, in the case at bar, says: "There is no ambiguity in the language of the condition set out in the policy" (Rec., p. 8). There is no contention on our part that there is an ambiguity. What we contend is not that the language is ambiguous, but that the condition should not be construed liberally; that it should not be held to in-

clude instruments in the nature of a mortgage. The court further says: "Its plain purpose is to guard against the encumbrances of the insured personal property without the knowledge and consent of the insured. * * *" If such be its intended purpose, why did not the insurance company make the condition specifically refer to deeds in the nature of mortgages or use language sufficiently broad to include all encumbrances? The only purpose of this condition is to create a cause for forfeiture; it is not to protect the company issuing the policy, as the risk is in no measure enhanced by reason of encumbrances of this character or of any character. The companies do not refuse to insure where encumbrances exist, whether by chattel mortgage or by chattel deeds of trust; nor do they exact a higher rate of premium for accepting such rates. It has been suggested in some of the early cases that where an encumbrance exists the party insured has not the same interest in the property as he would otherwise have; that the party secured has an interest. This idea has long sinee been exploded, as the courts have repeatedly said if there is an encumbrance there is an obligation for the insured to pay, and if the property is destroyed and there is no insurance the debt still exists.

The supreme court of Indiana, in the case of Continental Insurance Company *vs.* Vanlue, in discussing this proposition, said:

> "The ground upon which rests the distinction between contracts of insurance and other contracts is a solid one, for the contract of insurance is, in many respects, a peculiar one. There is a strong reason for limiting the effect of the word 'encumbrance' when employed in policies of insurance, since to give the word a broad meaning would do injustice in many instances without excuse or justification. The purpose for which provisions prohibiting encumbrances are written in policies, is to create a cause for forfeiture, not to protect the company issuing the policy from a defect in the title of property conveyed to it; nor to vest in it an unencumbered title, and the only

> just reason for recognizing such prohibitions is that if the property is encumbered there may be some temptation to the owner to himself burn the property and thus secure the amount of the insurance" (126 Ind., pp. 414, 415).

Thus again the court in the same case says:

> "We are required by the rules to which we have referred to give the policy before us a very strict construction against the appellant, and to avert a forfeiture, if we can do so without doing violence to the language of the contract."

The statement by the Court of Appeals in the case of Middleton *vs.* Park that "it is sufficient answer to this that the deed of trust is the only form of mortgage that has been in general use in the District of Columbia for many years" is no doubt true, in so far as real estate is concerned, in which connection the court was discussing the matter in that case, *but it is not true as regards the use of the chattel mortgage and the chattel deed of trust.* The common-law chattel mortgage is used as frequently, if not to a greater extent, than chattel deeds of trust in this District and always has been in general use. There is hardly a secular day that instruments of both characters are not recorded and filed of record in the office of the recorder of deeds of the District of Columbia, and in this connection we desire to call the court's attention to the Real Estate and Court Record, which is a small newspaper published in the District of Columbia for the benefit of the legal profession, and in copies of this paper published on the following dates there will be found notices of the recording of instruments of both characters: July 22, 23, 25, 28, and 29, August 1, 2, 4, 9, 11, 15, 18, 20, 24, 31, September 1, 2, 7, 8, 9, 15, 20, 21, 22, 23, 24, 26, and 30, October 5, 6, 10, 14, 15, 18, 19, 20, 21, 25, 26, 27, 28, 29, 31, and November 1, in the year 1904. This memorandum of dates is taken at random

from recent files on hand, but is a fair statement of what the average for years past would show.

After a full and careful consideration of all the authorities we contend, on behalf of the plaintiff in error, that it is apparent that the courts below erred, and we respectfully submit the judgment of the Court of Appeals affirming the judgment of the supreme court of the District of Columbia overruling plaintiff's demurrer to the defendant's fifth and sixth pleas should be reversed.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 65.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

PLAINTIFF IN ERROR'S BRIEF IN REPLY TO MOTION TO DISMISS.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff in Error.

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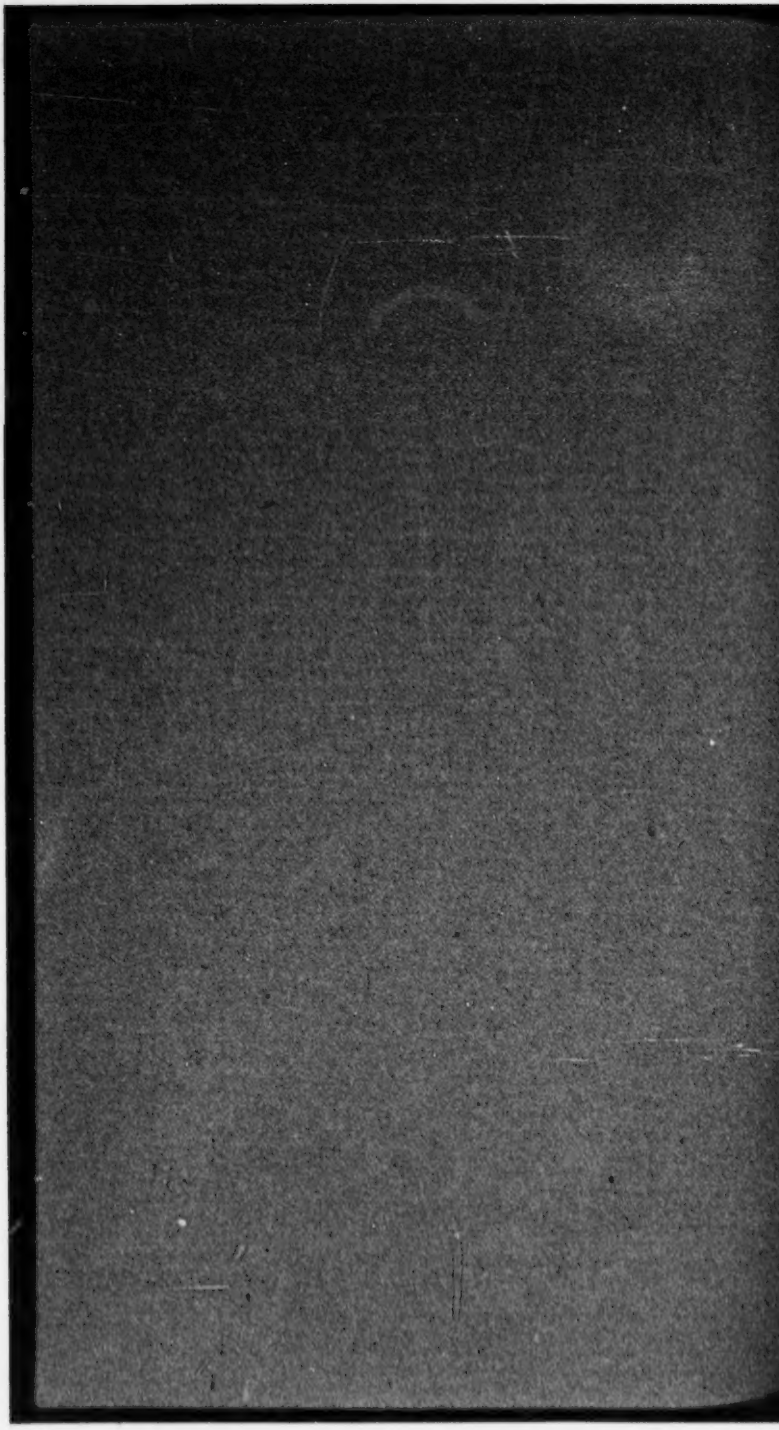

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 65.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

Plaintiff in Error's Brief in Reply to Motion to Dismiss.

The motion to dismiss on the ground that the matter in dispute does not exceed the sum of $5,000 can hardly be sustained, when an examination of the declaration shows that plaintiff at the time that the suit was filed was entitled to recover the sum of $5,012.50. It is admitted on behalf of the defendant in error that the policy of insurance mentioned in the declaration is a standard policy, and the declaration shows the policy as being due sixty days after the proof of loss, and the $12.50 is claimed as interest accrued from the expiration of the period of sixty days to the date of suit. The rate of interest, as prescribed by section 713 of

the Revised Statutes of the District of Columbia, which was in force at the time of the occurring of the loss alleged in the declaration for the forbearance of any money, goods, or things in action, was 6 per cent. and there accrued, the policy being due two months after the proof of loss, to the plaintiff in this case the sum of $12.50 before the suit was brought; therefore the amount involved is more than $5,000.

The authorities cited by defendant in error in no way affect this contention. In the cases where the suit was dismissed for want of jurisdiction, although the *ad damnum* clause claimed the jurisdictional amount, it was apparent on the face of the record that no such amount could be recovered, and this court said, and rightly said, that a party cannot by his *ad damnum* clause give this court jurisdiction where on the face of the record it appears that it has no such jurisdiction.

The case at bar is entirely different. Here the declaration on its face shows a jurisdictional amount, and shows conclusively that if plaintiff had recovered in this case that the accrued interest would have been necessarily a part of the verdict, for according to law interest would run on this policy of insurance sixty days after the proof of loss, and that interest would be part of the claim litigated, and not given merely by way of damages for the non-payment of the policy of insurance.

In the case of Webster *vs.* The Buffalo Insurance Co., 110 U. S., 386, cited by defendant in error, the court, speaking of the policy in that case, referred to the fact that if the plaintiffs had recovered according to their claim as stated in the pleadings, their judgment, *after interest added*, would have been less than $5,000. In the case here at bar there can be no dispute but that, if we add to the face value of the policy the interest, it exceeds the amount of $5,000.

An examination of the decisions of this court will show that not only has this court held it has jurisdiction where interest has been claimed, but even in cases where interest

was not a part of the verdict, but still given by law to the judgment, this court has sustained its jurisdiction.

Mass. Beneficial Asso. *vs.* Miles, 137 U. S., 680.
Washer *vs.* Bullitt Co., 110 U. S., 558–562.
District of Columbia *vs.* Gannon, 130 U. S., 227.
Guthrie Nat. Bank *vs.* Guthrie, 173 U. S., 533.
Woodward *vs.* Jewell, 140 U. S., 247.

FURTHER ARGUMENT ON MERITS.

The attempt on the part of the defendant in error to construe the instrument mentioned in the pleas as a chattel mortgage on account of the demurrer filed thereto is not well taken, for wherever the term "chattel mortgage" is used in the pleas it is afterwards explained and the instrument is described as a deed in trust or deed of trust. Plea five refers to plea four for the instruments, and in plea four the instruments are fully described under the subheads A, B, and C, and each subhead shows therein described a deed of trust and not a chattel mortgage. In plea six, although the instrument is spoken of as a chattel mortgage, it is described in the latter part of the plea, and reference is made thereto, after stating date and where recorded, as follows:

"Said deed being in trust to secure the payment to D. R. McNaught for the sum of $420 with interest, the property covered by said *deed of trust* being more particularly described" etc.

So that it can hardly be contended that the instruments referred to in these two pleas are not what are known in law as chattel deeds of trust. Any other contention would beg the question involved in this case, and this court has here the simple question of whether or not, under the conditions of the policy mentioned in the declaration, there was a forfeiture by reason of the fact that the assured placed on said property certain chattel deeds of trust.

The Dumas case, 12 App. D. C., 245, referred to by defendant in error, has no application to the case at bar. No contention was raised therein as to the distinction between chattel deeds of trust and chattel mortgages, but there was involved in that case the question of sole ownership, as well as the question of fraud and misrepresentation on the part of the assured.

The only authority to uphold the contention of the defendant in error is the very decision that we seek here to reverse, and this decision is certainly contrary to all authority.

The question involved is one of substantive law, and the Maryland authorities cited by plaintiff clearly show that there is a distinction in substance as well as form between a deed of trust and a mortgage. While it is admitted by both parties there is no ambiguity in this condition, still the defendant in error would have this court construe the condition to include instruments that are not named therein. They would further have this court give to this condition, which works a forfeiture, a liberal, or what we might call equitable, construction when this court has decided again and again that conditions or clauses in insurance policies that work forfeitures should be strictly construed.

In the case of Hosford *vs.* The Hartford Fire Insurance Co., 127 U. S., 404, it was contended that a lien created by law for unpaid taxes worked a breach of the warranty requiring a disclosure from the applicant of all facts in regard to the condition of the ownership, title incumbrances of all kind, and also to answer this question: "Is there a mortgage, deed of trust, lien, or incumbrance of any kind on the property?" This court held that this question related only to incumbrances created by the act or with the consent of the applicant, and that the omission to disclose the existing lien created by statute for unpaid taxes was no breach of the warranty.

In the above quoted case there was a question of war-

ranty involved—not forfeiture—and this court did not, in a case of that kind, see fit to read into the warranty a lien created by statute.

Speaking of these conditions which work a forfeiture, the supreme court of the State of Iowa, in the case of Lodge *vs.* The Insurance Company, 91 Iowa, 105, where the condition of the policy was "that it shall be void if incumbrance be placed thereon" and a judgment had gone against the insured, say:

"Courts are not disposed to construe these restrictions and limitations in insurance policies more liberally than is required from the language used, and thereby defeat what otherwise appeared to be honest claims for indemnity against loss. As is usual in the law of insurance, there are adjudged cases to be found on both sides of the question as to whether a judgment is a lien within the meaning of clauses somewhat similar to the one in the case at bar. That judgment is not a lien in such a case, see Bailey *v.* Insurance Co., 80 N. Y., 21 (and other cases). Our conclusion is that if it is desired to make the policy void by incumbrances which are not placed on the property by the act of the parties, *it should in terms be so provided in the contract.*"

It is therefore respectfully submitted that there is no foundation in the contention of the defendant in error which attempts to read into the condition of this policy the instrument known as a chattel deed of trust, when the condition by its words excludes such instrument, and there is no known rule of law that brings it within either the letter or wording of such a condition.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 63.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, DEFENDANT.

BRIEF IN BEHALF OF DEFENDANT.

ANDREW B. DUVALL,
Attorney for Defendant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 65.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, DEFENDANT.

BRIEF IN BEHALF OF DEFENDANT.

This is a writ of error to review the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, overruling the plaintiff's demurrer to certain pleas filed by the defendant company in an action upon a certain policy of insurance issued by the defendant to the plaintiff insuring against loss or damage by fire certain furniture and other personal property in her residence, number 1636 Sixteenth street N. W., in the city of Washington, D. C.

The declaration (Rec. p. 1), alleged that on February 2, 1901, the defendant company issued to the plaintiff a certain policy of insurance in consideration of the stipulations therein recited and the payment by her of the sum of fifteen dollars as a premium, whereby it insured the plaintiff for the term of one year against loss or damage by fire to an amount not exceeding $5,000; that at the time of issuing said policy and until it was damaged by fire the plaintiff was possessed, as sole owner, of said insured property; that on or about

February 16 and February 17, 1901, the said insured property was destroyed by fire, whereby the plaintiff sustained loss and damage to the extent of $5,000; that the plaintiff had performed and observed all of the stipulations and conditions of the policy and had made proofs of the loss in accordance therewith, but the defendant had refused to pay the loss or any part thereof.

To this declaration the defendant filed seven pleas. The plaintiff demurred to the fifth and sixth pleas, and moved to strike out the second and fourth pleas. The latter motion was granted; but the demurrer to the fifth and sixth pleas was overruled (Rec. p. 5). The plaintiff elected to stand upon the demurrer, whereupon judgment was entered in favor of the defendant and against the plaintiff, from which judgment the plaintiff appealed to the Court of Appeals where the judgment was affirmed.

The pleas sustained by the court are set out (Rec. p. 4). The fifth plea was that:

> "By said policy of insurance it was provided that if the subject-matter of the insurance should be personal property the said policy should be void if said property should be or become encumbered by a chattel mortgage, and, in fact, the subject of insurance in said policy was wholly personal property, and that the same was encumbered by certain chattel mortgages, as more specifically set forth in plea numbered four."

As set out in said plea numbered four it was alleged (Rec. p. 3) that the plaintiff had conveyed said property or a part thereof by four certain deeds in trust therein described to secure the payment of certain specified sums of money in the fall of the year 1900, a few months before procuring the policy of insurance from the defendant.

The sixth plea (Rec. p. 4) alleged that—

> "the subject of insurance in said policy was wholly personal property, and after the execution of said

policy, to wit, on February 7, 1901, the said plaintiff executed a chattel mortgage, whereby she encumbered the personal property or part thereof covered by said policy of insurance, and conveyed the same by deed dated February 7, 1901, which was recorded on the same day in Liber 2533, folio 322, of the land records of the District of Columbia, sa'd deed being in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars ($420) with interest, the property covered by said deed of trust being more particularly described in a paper annexed to said deed as recorded and marked Schedule 'A.'"

Motion to Dismiss for Want of Jurisdiction.

The defendant moves to dismiss the writ of error herein because the matter in dispute does not exceed $5,000. The Code of Law for the District of Columbia provides as follows:

> "Sec. 233. Any final judgment or decree of the Court of Appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

The matter in dispute was the payment of a $5,000 policy of fire insurance. The declaration claimed (Rec. p. 2) "that the plaintiff sustained loss and damages, to wit, $5,000." This was the matter in dispute; and because the plaintiff

claimed in the *ad damnum* clause of her declaration $5,012.50,

> "being the total amount of the policy and ~~$1,250~~ interest on the same from June 2, 1901, to June 17, 1901, together with interest thereon from June 17, 1901,"

the matter in dispute was still the payment of $5,000, notwithstanding the plaintiff claimed interest. The interest was not the "matter in dispute;" it was a mere incident thereto. If the plaintiff was entitled to recover under the policy the $5,000 the interest would be allowed not as a part of the "matter in dispute" but as damages for the detention of the claim.

> "It was decided in Lee *vs.* Watson, 1 Wall, 339 (68 U. S. 558), that 'in an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion, must be considered in determining whether this court can take jurisdiction on a writ of error sued out by the plaintiff.' Such is now the established rule."
>
> Schacker *vs.* Ins. Co., 93 U. S. 241.
> Gray *vs.* Blanchard, 97 U. S. 565.
> Tinstman *vs.* Nat. Bank, 100 U. S. 6.
> Hilton *vs.* Dickinson, 108 U. S. 165.
> Bkg. Asso. *vs.* Ins. Asso., 102 U. S. 121.
> Webster *vs.* Buffalo Insurance Co., 110 U. S. 385.

Interest is considered in determining appellate jurisdiction only in cases (1) where judgment has been rendered with interest, or (2) where the action was *ex contractu* and special provision had been made in the contract itself for the interest claimed in the declaration.

In the case at bar there has been no judgment on the merits nor is there any provision in the contract sued upon for payment of interest.

ARGUMENT FOR DEFENDANT ON THE MERITS.

There Was a Breach of the Contract of Insurance by the Plaintiff, Which Disentitled Her to Recover.

It was argued in plaintiff's brief below that the question for determination was whether there is not a distinction in the condition in the policy of insurance between a "chattel mortgage" and "a deed in trust," the provision in the policy of insurance being that the "policy should be void if the said property should be or become encumbered by a chattel mortgage." That question, it is respectfully insisted, is not before the court on the record in this case, because the fifth plea alleges that the property "was encumbered by certain chattel mortgages," and the allegation of the sixth plea is that after the execution of the said policy the plaintiff executed a "chattel mortgage" on the property and conveyed the same—

> "by deed in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars, with interest."

This is descriptive of a chattel mortgage pure and simple. Where is there anything anywhere in this record which would justify the court in holding that any of the encumbrances mentioned in said pleas were not chattel mortgages? The plaintiff by her demurrer admitted that they were such.

The contention of the plaintiff is that there are clear distinctions between a mortgage and a deed in the nature of a mortgage, and that the condition in the policy of insurance relates exclusively to a mortgage; that the creditor secured by a chattel mortgage has the legal title and right of possession, unless there be some condition in the mortgage by which the mortgagor or debtor remains in possession until default; while the creditor or *cestui que trust* would never be entitled, under any circumstances, to the possession of the

chattels conveyed by the instrument to the trustees. This is an entirely inadequate statement. Mortgages not unusually contain a provision for the mortgagor to remain in possession, and they very frequently contain a power of sale, and almost universally the mortgagor remains in possession.

Counsel for the plaintiff has exhibited no case in which any court has held that such a condition as the one in this policy of insurance is not violated by a chattel deed of trust, or that there is any distinction under that condition between a chattel mortgage and a chattel deed of trust. The cases cited below did not support any such proposition.

The condition of the policy of insurance here sued on was that the policy should be void if the property should be or become encumbered by a chattel mortgage; such a condition was not contrary to law and it was entirely competent for the parties to the contract to so stipulate. Such a valid condition if broken constitutes a bar to the plaintiff's action and defeats any recovery on the policy.

This was admitted below by the plaintiff and it is understood that there is no claim otherwise now.

The court below had specifically so held in Dumas *vs.* Insurance Co., 12 Apps. D. C. 245.

That case was an action on a "standard" policy of insurance, the provisions of which were identical with the policy in suit, namely:

> "That it should be void if the insured had concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or if the interest of the insured in the property were not truly stated in the policy, or in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after loss. And that unless otherwise provided by agreement endorsed upon the policy, it should be void if the insured should make any other contract of insurance on the property covered by the said insurance, or

> any part of it, or if the interest of the insured were other than unconditional and sole ownership, or if, the subject of the insurance being personalty, were or became encumbered by chattel mortgage, or if, with the knowledge of the insured, foreclosure proceedings were commenced, or notice of sale were made of any of the property by virtue of a mortgage or trust deed."

The insurance company claimed there, as here, that there was a breach by the appellant of the contract of insurance because, among other things, the appellant was not the unconditional and sole owner of the property and because the property was encumbered "by a chattel mortgage or deed of trust," whereby—

> "the plaintiff had conveyed a part of said property to Henry F. Woodard by deed dated January 31, 1896, which was recorded on the 31st day of February, 1896, in Liber 2093, folio 152, of the land records of the District of Columbia, said deed being a deed in trust to secure the payment to the firm of Craig & Harding of the sum of $671.01," etc.

The court in its opinion said:

> "Courts have sometimes been too astute in their search for reasons to maintain the liability of insurance companies in the face of conditions limiting such liability. And yet a contract of insurance in this regard is no different from other contracts; and the function of courts is to construe them, not to make them. In the absence of statutory provisions to the contrary, insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations not inconsistent with public policy; and the courts have no right to add anything to their contracts or to take anything from them. If those contracts contain harsh and onerous conditions which perhaps a court of equity might not enforce, if called on so to do, yet there is no compulsion, either legal or

moral, on parties to deal with them upon the basis of such conditions. And certainly it would be a novel contention for parties to seek to enforce liability under such contracts in a court of common law, and at the same time to repudiate the express conditions upon which such liability is made to depend.

"We must take it for granted, therefore, that our duty in the premises is to construe the contract of insurance before us according to its true legal intent and meaning, and not in any manner to vary or modify the instrument itself by disregard of any of its provisions. It is true, however, that this construction must be with reference to the well established rule that, if a policy of insurance is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. Imp. Fire Ins. Co. *vs.* Coes County, 151 U. S. 452. . . . It may be that it was in consequence of such decisions of the courts as those to which we have referred, wherein it was held that there was sole and unconditional ownership, in the legal sense of the policy of insurance, notwithstanding the existence of an outstanding mortgage, that insurance companies sought further to limit their liability by imposing conditions against such mortgages. But whatever may have been the suggestion for these conditions, it is very certain that they add limitations to the policy beyond that of sole and unconditional ownership, which we can not disregard. It was the right of the company in this case to refuse to insure mortgaged property, and to provide that its policy of insurance, however otherwise conditioned, should not cover personal property encumbered by a chattel mortgage. . . . The parties have deliberately put into their contract and have made it an essential condition of that contract that the contract itself should not be binding, if there was any mortgage on the property or the title was not that of unconditional ownership. There was no inhibition by the law against the insertion of such a condition in the contract; and it may

> well be that its insertion was a matter of precaution, to guard as well against the negligence or failure of agents to elicit proper information, as against the negligence or failure, not fraudulent, of persons seeking insurance to give such information. The condition is not illegal and does not contravene any rule of public policy; and even if its practical effect should be held to be to throw upon the insured party the burden of giving voluntarily the information which otherwise the insurer would have been required to elicit by proper inquiry, we know of no rule of law that would preclude parties from contracting to that effect, if they so desire."

The court further held that the policy of insurance being a single, entire, and indivisible contract was invalidated by the forfeiture.

This court has held that where the averment in the application for insurance is that the statements and declarations made therein are in all respects true, and the policy is made and accepted upon the express condition and agreement that such statements and declarations are in all respects true, this stipulation is not made as to important or material statements only, but as to all statements; and it is no answer that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. A false answer to an inquiry, whether the applicant has made any other application to have his life insured and whether he is married or single was held to avoid the policy.

Jeffries *vs.* Econ. Mut. Life Ins. Co., 22 Wall. 47.

The rule of construction is settled by this Honorable Court.

Said Mr. Justice Jackson, in Imperial Fire Ins. Co. *vs.* County of Coes, 151 U. S. 461:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties.

For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured can not bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured can not recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made. It is settled as laid down by this court in Thompson *vs.* Phenix Ins. Co. of Brooklyn, 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonable men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

"But this rule is equally well settled that *contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.*"

Apply this rule of construction to the case at bar, and what becomes of the plaintiff's contention?

It is well settled that in the District of Columbia there is no recognized difference between deeds of trust and mortgages. In Middleton *vs.* Parke, 3 App. D. C. 149–164, Mr. Justice Morris, delivering the opinion of the court, said:

> "The deed of trust is the only form of mortgage that has been in general use in the District of Columbia for many years. The common law mortgage is practically unknown with us; *and everyone understands that, when a mortgage of real estate here is spoken of, the deed of trust is what is intended. . . . The deed of trust is here used as the equivalent of mortgage; and so the term is universally used by the community.* Indeed, while a mortgage is not necessarily perhaps a deed of trust, a deed of trust to secure the loan of money is necessarily a mortgage."

It is respectfully submitted that the Maryland cases relied on by plaintiff are inapplicable to the question here involved, and even if they were they do not constitute authority in the District of Columbia.

Mr. Justice Shepard, speaking for the Court of Appeals of the District of Columbia, in affirming the judgment overruling the demurrer to the pleas (20 Apps. D. C. 48), said:

> "But the contention is, that the terms of the condition must be strictly construed, resolving all doubts in favor of the insured; and that so construed there is a distinction at law, to which effect must be given, between the chattel mortgage therein mentioned and a chattel deed in trust as described in the plea.
>
> "The argument in support of this contention is ingenious, but it lacks substantial foundation. There is no ambiguity in the language of the condition set out in the policy. Its plain purpose is to guard against the encumbrance of the insured personal property without the knowledge and consent of the insurer, whether it be by way of a technical chattel mortgage simply, by such a mortgage

with power of sale in the mortgagee, or by a conveyance in trust to third persons with similar power of sale in case of the default of the mortgagor. Each is a chattel mortgage within the ordinary meaning of the term (Middleton vs. Park, 3 App. D. C. 149, 164). That case was an action of ejectment to recover the possession of land that had been sold under a deed of trust executed by a guardian under the authority of the equity court. The authority given was to 'mortgage' the land. The case turned upon the contention, which was denied, that the power to 'mortgage' did not authorize a security by conveyance in trust. That contention had more plausible foundation than the one in the case at bar."

No reasonable rule of construction, however strict, would justify the plaintiff's contention that a chattel deed of trust was not within the condition of the policy of insurance in this case; it is both within the letter and the spirit of the condition; and it is respectfully submitted that there is no error in the record and the judgment below should be here affirmed.

ANDREW B. DUVALL,
Attorney for Defendant.

Supreme Court of the United States.

No. 65.—October Term, 1904.

Martha I. Hunt, Plaintiff in Error,
vs.
The Springfield Fire and Marine Insurance Company.

In error to the Court of Appeals of the District of Columbia.

[December 19, 1904.]

This was an action to recover on a policy of insurance upon household furniture and ornaments.

Defense: That it was provided that the policy should be void if the interest of the insured was other than the unconditional and sole ownership of the property insured, or if the "said property should be or become encumbered by a chattel mortgage," when in fact it was subject, at the time the policy was written, to three trust deeds to secure the payment of various sums of money. Plaintiff demurred to the pleas setting up this defense. The court overruled the demurrer, entered judgment for the defendant, which was affirmed by the Court of Appeals. (20 Apps. D. C. 48.)

Mr. Justice Brown delivered the opinion of the Court.

The sole question presented by the record in this case is whether the provision in the policy for the unconditional ownership of the property by the plaintiff, and for the non-existence of any chattel mortgage thereon, was broken by certain trust deeds to secure the payment of money in each case.

Plaintiff relies upon the familiar principle of law that the conditions of a policy of insurance, prepared as they are by the company, and virtually thrust upon the insured, frequently without his knowledge, must be construed strictly, and while the legal effect of a chattel mortgage and of a deed of trust to secure the payment of money may be practically the same, they are in law different instruments; and that a condition against one is not broken by the existence of the other. We recognize the rule laid down by this court in *Thompson* v. *Phenix Insurance Company*, (136 U. S. 287,) that in case of attempted forfeiture, if the policy be fairly susceptible of two constructions, the one will be adopted which is more favorable to the insured. This rule was reiterated in *McMaster* v. *New*

York Insurance Company, (183 U. S. 25,) but we cannot recognize it as applicable to this case.

A deed of trust and chattel mortgage with power of sale are practically one and the same instrument, as understood in this District. In the language of Mr. Justice Morris, in speaking of mortgages of real estate in *Middleton* v. *Park*, (3 App. Dist. Col. 149):

"The deed of trust is the only form of mortgage that has been in generaal use in the District of Columbia for many years. The common law mortgage is practically unknown with us; and every one understands that, when a mortgage of real estate here is spoken of, the deed of trust is what is intended. . . . The deed of trust is here used as the equivalent of mortgage; and so the term is universally used by the community. Indeed, while a mortgage is not necessarily perhaps a deed of trust, a deed of trust to secure the loan of money is necessarily a mortgage."

It was said by this court in *Shillaber* v. *Robinson*, (97 U. S. 68–78,) that "if there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery."

The legal effect of the two instruments has been recognized as practically the same in several cases in this and other courts. (*Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48–57; *Palmer* v. *Gurnsey*, 7 Wend. 248; *Eaton* v. *Whiting*, 3 Pick. 484; *Wheeler & Wilson Mfg. Co.* v. *Howard*, 28 Fed. Rep. 741; *Bartlett* v. *Teah*, 1 McCrary, 176; *Southern Pacific R. R. Co.* v. *Doyle*, 11 Fed. Rep. 253; *McLane* v. *Paschal*, 47 Texas, 365.)

There may be cases under particular statutes recognizing a difference between them in reference to the application of the recording laws, as appears to be the case in Maryland, (*Charles* v. *Clagett*, 3 Md. 82,) but in their essential features and in their methods of enforcement they are practically identical. Both are transfers conditioned upon the payment of a sum of money; both are enforceable in the same manner, and the difference between them is one of name rather than substance. The provision in the policy is one for the protection of the insurer, who is entitled, if he insists upon it in his questions, to be apprised of any fact which qualifies or limits the interest of the insured in the property, and would naturally tend to diminish the precautions he might take against its destruction by fire.

In passing upon the identity of the two instruments in this case we may properly refer to the further provision of the policy that the interest of the insured must be an unconditional and sole ownership. While the breach of this condition is not specifically urged in the briefs, we may

treat is as explanatory of the other condition against the existence of chattel mortgage. The company evidently intended by this provision to protect itself against conditional transfers of every kind. The contract of the company is a personal one with the insured and it is not bound to accept any other person to whom the latter may transfer the property.

The conditions of the policy in this case were broken by the trust deeds, and the judgment of the court below is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.